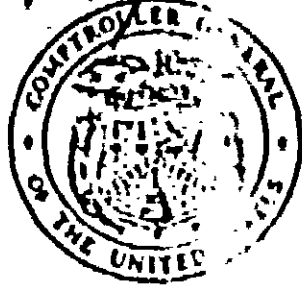


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DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

21037

FILE: B-204313

DATE: March 8, 1982

MATTER OF: Albert T. Tsukayama - Waiver of Erroneous
Overpayments - Living Quarters Allowance

DIGEST: Employee who owned own home was entitled to Living Quarters Allowance for up to 10 years. Due to administrative error employee continued to receive allowance payments beyond 10-year entitlement period. The debt may not be waived since employee admits knowledge of 10-year entitlement limitation, and made inquiry to responsible official regarding propriety of continuation of payments beyond 10-year period. Employee's inquiry indicates that he was aware there was some question as to the correctness of the continuation of the allowance, and his failure to finally resolve question evidences partial fault, precluding waiver.

This is an appeal of our Claims Group's settlement 2-2786210 dated October 12, 1979, denying a request for waiver, under 5 U.S.C § 5584 (1976), of erroneous payments of Living Quarters Allowance. The denial of waiver is sustained, since we find that the recipient of the overpayments had knowledge of the 10-year limitation period that pertained to the allowance. The recipient had directed an inquiry to a responsible official regarding the propriety of continuation of the allowance beyond the 10-year limitation period. That inquiry indicates that he was aware that the propriety of the continuation of payments was questionable and waiver is not otherwise authorized under such circumstances.

Mr. Albert T. Tsukayama, a civilian employee, Department of the Air Force, Okinawa, Japan, was authorized to receive a Living Quarters Allowance (LQA) for a privately owned residence under Department of State Standardized Regulations. A new provision, section 136, relating to personally-owned quarters was added to the Standardized Regulations effective October 27, 1974, to clarify LQA eligibility and payments for occupant-owned housing. The

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allowance consists of both rent and utilities portions. The new section provided in pertinent part as follows:

"* * * The payment of the rental portion of the allowance (up to 10 percent of purchase price) is limited to a period not to exceed ten years at which time the employee will be entitled only to the utility expense * * *"

For Mr. Tsukayama, the 10-year entitlement period for the rental portion expired on October 27, 1974, the effective date of the new provision, since, as of that date, Mr. Tsukayama had already been receiving the rental portion of the allowance for 10 years. However, due to an administrative oversight, the LQA was not adjusted to reflect the reduction in entitlement resulting from the expiration of the 10-year period until May 17, 1977. The total amount of the overpayment was \$3,069.67. Mr. Tsukayama was officially notified of the overpayments and the extent of the debt on May 18, 1977.

Mr. Tsukayama requested waiver of all the overpayments. The Department of the Air Force recommended that we deny waiver because it questioned the employee's good faith and it also believed the employee to be partially at fault under the following reported circumstances. Mr. Tsukayama states that he made an inquiry regarding his LQA at the time the Standardized Regulations were changed to reflect the imposition of the 10-year limitation in October 1974, which was also contemporaneous with the expiration of his own 10-year entitlement period. Mr. Tsukayama reports that he directed his inquiry to the Civilian Personnel Officer (CPO), specifically regarding whether the 10-year eligibility period was cumulative or whether the period began to run anew with the purchase of a new home. Mr. Tsukayama reports that at the time of his inquiry he had been in his second home for only 6 years, but had exceeded 10 years if the time LQA was received for the occupation of his first residence was also required to be counted under the regulations.

Mr. Tsukayama states that he was advised by the CPO that his instructions did not specifically cover the question of whether tacking of both periods was required and indicated that clarification from higher headquarters would be obtained. Since he did not hear anything further regarding his question from the CPO, Mr. Tsukayama states that he assumed that his 10-year eligibility period would begin anew when he moved into his present second home. Mr. Tsukayama explains his lack of follow-up inquiry with the CPO by pointing out that since he was a Supervisory Personnel Management Specialist on the CPO's staff, the CPO "was fully aware of my situation, and I assumed that I would be notified if clarification from higher headquarters indicated a change in my status." However, it is the position of the Air Force that since Mr. Tsukayama was a member of the Civilian Personnel Staff, his failure to receive a clarification of his LQA entitlement should have required continued inquiries regarding the matter.

Applying the provisions of 5 U.S.C. § 5584 (1976), our Claims Group denied waiver on the basis that Mr. Tsukayama was aware of the 10-year limitation on payment of LQA to an employee who had purchased a house and he was also aware that he had received LQA for 10 years. The Claims Group concluded that Mr. Tsukayama had a duty to verify his entitlement under the circumstances, and that his failure to do so placed him at least partially at fault. Thus, the Claims Group stated that it was statutorily precluded from waiving the claim.

The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584 (1976), permits such waivers only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other person having an interest in obtaining the waiver, and the collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States.

The word "fault" as used in 5 U.S.C. § 5584 has been interpreted as including something more than a proven overt act or omission by an employee. Fault is considered to exist if in the light of all the facts, it is determined that an employee exercising reasonable diligence should have known that an error existed and taken action to have it corrected. The standard employed by this Office is to

determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements. 4 C.F.R. § 91.5(c) (1981) and George R. Beecherl, B-192485, November 17, 1978.

Employees are under a duty to bring pay questions to the attention of appropriate agency officials. This duty applies to cases of continued receipt of the same salary when a reduction is expected. See Vivian J. Lucas, B-190643, July 6, 1978; George R. Beecherl, supra.

Although there is no indication of fraud or misrepresentation on Mr. Tsukayama's part, we have consistently held that where the employee was aware of the overpayment when it occurred, he is not entitled to relief under 5 U.S.C. § 5584. Acceptance of the overpayments with knowledge of their erroneous nature constitutes "lack of good faith" and waiver is prohibited by law. Moreover, we have held that an employee must do more than merely notify administrative officials of an overpayment when the employee is aware of the error, and that as a reasonable and prudent person who knows that he is being overpaid, the employee should set aside the amount of the overpayment for eventual refunding when the error is finally corrected. See Thomas K. Nahulu, B-189657, August 18, 1977; Ann J. Pelick, B-189083, September 13, 1978.

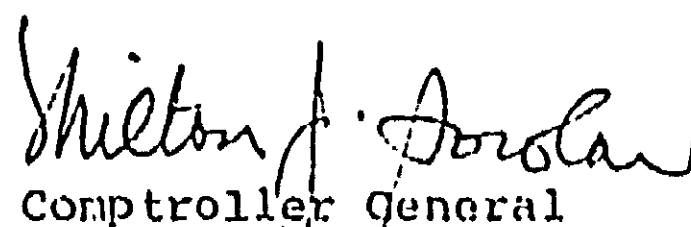
The record indicates that at the time the error occurred Mr. Tsukayama had served as an employee of the Federal Government for 28 years. He had been employed both as a Classification and Wage Specialist and as a Employee Relations Specialist, and was serving in the position of Supervisory Personnel Management Specialist in the Civilian Personnel Office at the time of the overpayments. Further, the employee acknowledged that he was aware of the 10-year limitation that pertained to his LQA, and the only question was whether it began to run anew when a new home was purchased. Mr. Tsukayama made only one inquiry, and then simply assumed that, since he had heard nothing, there was no error. We find that with this background of experience and knowledge, Mr. Tsukayama should have been expected to pursue more actively the matter of a possible error, and not have assumed that the CPO's failure to respond to his initial inquiry was a ratification of the continuing LQA payments.

Since Mr. Tsukayama was aware of the possibility of overpayments resulting from the failure to reduce his LQA payments, he had a duty to make efforts to correct the error. Although he did question the personnel office about the payments, he made no further efforts to have the mistake corrected, and determine his entitlement to those payments. Therefore, he could not reasonably expect to retain the excess amounts without being obligated to make a refund when the error was corrected, and it would not be against equity and good conscience to require payment. Ann J. Pelick, supra.

We cannot find that Mr. Tsukayama was free from fault or that he accepted the overpayments in good faith as required under the above cited law and regulations. The fact that Mr. Tsukayama may have to suffer a financial hardship in repayment of the amount is not sufficient to authorize waiver in light of the above findings. Jon D. Lemmon, B-200450, June 18, 1981.

In his appeal, Mr. Tsukayama mentions that another employee similarly situated has had his waiver request reconsidered and approved by our Office. Although Mr. Tsukayama did not identify his colleague, we have searched our records and believe that Mr. Tsukayama may be referring to the waiver application of Mr. Susumu Nagata. An examination of Mr. Nagata's case shows that the facts concerning the overpayment in that case were significantly different from Mr. Tsukayama's request for waiver. For example, nothing in the record indicates that Mr. Nagata was ever informed of the 10-year limitation on LQA payments, and, therefore, he had no reason to question the accuracy of his pay when his LQA did not decrease after the expiration of the 10-year limitation period. Thus, the Claims Group settlement concerning Mr. Nagata's request for waiver is distinguishable from this case and is not precedent for a decision here.

Accordingly, the Claims Group's denial of Mr. Tsukayama's request for waiver is sustained.

for 
Comptroller General
of the United States